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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 245

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, A UTAH CORPORATION, SOLE,

Appellant,

vs.

CITY OF PORTERVILLE, A MUNICIPAL CORPORATION, ET AL.,

Appellee

ANSWER TO PETITION FOR REHEARING

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ANSWER TO PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On October 10, 1949, this Honorable Court made the following order:

> "PER CURIAM: The motion to dismiss is granted and the appeal is dismissed for want of a substantial Federal question"
> (94 L. ed. Adv. Op. p. 34).

It is respectfully submitted that the Petition for Rehearing and vacation of this order should be denied.

Substantially, the *Petition for Rehearing* duplicates the arguments of the *Statement As to Jurisdiction* previously filed by appellant. It does not purport to answer, nor in the main, to controvert, the points and authorities of appellees, submitted in the *Statement Opposing Jurisdiction* and *Motion to Dismiss or Affirm.*

On pages 12-16 of the *Statement Opposing Jurisdiction,* etc. an adequate answer was made to the claim that the nondiscriminatory zoning ordinance in question was "an unwarranted restriction on religious worship." The authorities there cited, and the considerations there advanced, were never answered by appellant at the time, and are not answered in the *Petition for Rehearing* now. How a corporation—even a corporation sole—can claim that its *personal* rights of freedom of worship could be involved is not apparent. In what way is the corporation sole a citizen whose privileges and immunities are violated?

cf. Stone J. in Hague v. Comm. Ind. Org. 307 U. S. 496, 520-522.

Neither the Porterville congregation nor any member thereof was ever a party to this law suit, involving the temporal relationships touching land use and ownership.

The existence of the zoning ordinance, (in fact, its preexistence in relation to appellant's land ownership) did not "prohibit anyone worshipping, dictate his belief, censor it, tax it, or force external conduct incompatible with religious belief" (*Statement Opposing Jurisdiction* etc. p. 11-12)

Jones v. Opelika, 316 U. S. 584, 593-4, 595-6.

This Court, in granting the motion to dismiss, did "appraise the substantiality of the reasons advanced in support of the regulation" as indicated in Schneider v. Irvington, 308 U. S. 161, which reasons were succinctly advanced in the *Statement Opposing Jurisdiction* etc. p. 12-16.

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No federal question is presented, because the non-discriminatory zoning ordinance in question did not violate the I or XIV Amendments to the Federal constitution; and because the previous decisions of this Court foreclose the subject and "leave no room for the inference that the questions sought to be raised can be the subject of controversy" under the Federal constitution. The conditions summarized in Levering & Garrigues Co. v. Morrin, 289 U. S. 103, 105 and Millhein v. Moffet Tunnel District, 262 U. S. 710, 716, cited by petitioner, have been acted upon by this Court. The issues arise upon the pleadings, the challenge was as to constitutional power, and at this point there are no "merits" to be considered other than those presented in the legal challenge.

It is claimed that the "free exercise of religion" requires that the public authorities permit the construction of a church building anywhere within a city; the "preferred position" of the freedom of conscience requires that such buildings be exempted from the non-discriminatory ordinance provisions for the public safety, welfare and convenience, whereby zones are designated within which schools, lodges, club buildings, public buildings, public museums, etc. shall be permitted, and other zones are designated within which they are not.[1]

The logical extention of the contentions of appellant would be, that restrictions prohibiting erection of wooden buildings in fire limits, providing for doors opening out, adequate ventilation, and fire escapes, are all impairments of the "freedom of religion" because they necessarily im-

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[1] As pointed out in the respondent's *Statement Opposing Jurisdiction* and *Motion to Dismiss* (pp. 11-16), the basis for such classification rests in the definite need to regulate in the interests of public safety, welfare and convenience *all* uses which involve the assembly of persons in numbers; which impose special problems of fire and police protection, accommodation of traffic, and noise, in the midst of a residential section.

pose burdens on those who desire to establish a "church and youth center."

> "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquillity of a community."
>
> Kovacs v. Cooper, 336 U. S. 77, 93 L. ed. Adv. at 384.

This power was recognized (in converse to the present situation) in *Everson* v. *Bd. of Education*, 330 U. S. 1. The safety of school children could be protected by providing school busses at public expense, even though the destination of the children might be a religious, rather than public, institution, there being an incidental aid to religion, though aid per se is constitutionally prohibited. The safety of members of a church congregation, as individual citizens, may be protected; and the reciprocal safety, welfare and convenience of others can be protected against those who might infringe such rights. A may not excuse himself for walking over B's flowerbeds because he was on the way to church.

Petitioners contend that since this court struck down municipal ordinances which permitted restriction of distribution of religious literature on public streets *cf. Marsh* v. *Alabama*, 326 U. S. 501 or regulation of the use of a loud speaker in a public park *Saia* v. *New York*, 334 U. S. 558 (but compare *Kovacs* v. *Cooper*, 336 U. S. 77), on the ground that such conduct constituted an exercise of free speech and freedom of religion, *a fortiori* a city cannot regulate location of church buildings for public safety and welfare.

That this result does not follow inescapably is indicated by

Prince v. *Massachusetts*, 321 U. S. 158;
Kovacs v. *Cooper*, 336 U. S. 77;
In re Summers, 325 U. S. 561;
Chaplinsky v. *New Hampshire*, 315 U. S. 568.

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The action of this Court on October 10, 1949, does not contravene the doctrine or language of *Marsh* v. *Alabama*, 326 U. S. 501, 504-5 (cited in *Petition for Rehearing*, p. 3) as the ordinance in question does not "completely bar" churches nor does it prohibit or stultify freedom of religious worship. It does not by a license tax, seek to exact tribute as a condition precedent to the exercise of religion, nor to permit censorship by denial of a license, which liberty constitutionally is not subject to such a condition precedent. (*Murdoch* v. *Pennsylvania*, 319 U. S. 105, 108-9, Petition p. 45)

To permit disregard of the municipal police regulations in construction of buildings for worship, while enforcing such restrictions as to buildings for public schools, lodges (many of high ethical or religious motivation) and buildings for quasi-public uses, or made use of by members of the public in large numbers, would itself be public preferment and aid of religious organizations determined invalid in *Everson* v. *Board of Education*, 330 U. S. 1, 18 and *McCollum* v. *Board of Education*, 333 U. S. 203.

If a city is forced to admit such buildings and uses in first residential areas, where police, fire, or sanitary facilities, street paving and parking, etc. are adequate for such residential service; but are not, for protection and regulation of gatherings of large groups of people, what is the duty? To adequately protect and regulate the incidents of such gatherings requires in many instances more extensive paving and sidewalks, more police details and vehicles, larger water and sewer mains, additional water pressures. In a small community, dispersal of such facilities over a wide area either lengthens running time for fire, police and ambulance services from central locations (and consequent decreased effectiveness for public safety) or requires erection of new and costly facilities, and employment of more personnel. From the tax burdens incident to the provision

of such additional requirements, churches and eleemosynary institutions in California are constitutionally exempt.

Cal. Const. Art. XIII Sec. 1½ Sec. 1½a.

If the individual church or other such body were to undertake to meet such costs, it would be a tremendous burden. If there were a municipal regulation which would require them to meet such extra costs, as a condition precedent to such operation, could there still be the claim that "freedom of religion" would not constitutionally permit such charge?

(*cf. American Baseball Club* v. *Philadelphia*, 312 Pa. 311, 167 Atl. 891, 92 A. L.R. 386, which this Court refused to review.)

If such special burdens were to be assumed by the public, would there not be an unconstitutional public expenditure to aid religious purposes, prohibited by the California Constitution, Art. XIX, Sec. 3; and likewise prohibited under the XIV and I amendments?

Cf. Everson v. *Board of Education*, 330 U. S. 1, 15, 23, 26; *McCollum* v. *Board of Education*, 333 U. S. 203, 210-212.

Petitioner's approach to this problem (*Petition for Hearing*, p. 14-15) is to assert that any police regulation of location of church buildings and activities, can only be justified on the ground that a church is a bad thing for a community.

We must not overlook the impact of the location of any place of public assembly, for whatever purpose, upon a residential neighborhood. Bodies of people, coming and going, involve certain detriments, such as noise, dust; and traffic, with fumes, flashing of lights, and peaks of congestion. Sanctity of the purpose of assembly does not reduce these tangible factors. The concomitants of appellant's proposed "youth center" could not be expected to be any different than school yards. Other pertinent factors as to the quiet, repose, and tranquillity of a strictly residential

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area are self-evident. All of these factors, we submit, are relevant to municipal action in working out a reasonable accommodation between the competing requirements of a compact modern community.

The people of the community of Porterville, as in thousands of other American communities, have partially solved the problem by zoning. The places of public assembly, including churches, have been permitted in a large area (of a small city) convenient to the facilities present which are required for protection of public safety and welfare. Likewise, those to whom the incidents of such uses are discommoding, can find two small residential areas in which they are freed from the physical impact of large assemblies of people, while remaining within distance, so that they can benefit from schools, lodge and club halls, churches, museums and like uses. The zoning scheme is "narrowly drawn to *prevent* or control abuses or evils" arising from all such activity.

(Cf. *Murdoch* v. *Pennsylvania*, 319 U. S. 105 at 117.)

Petitioner claims that the residential areas are "exclusive" and complains because it may not share in such exclusiveness; that these areas are the most "desirable" areas, and that church buildings are relegated to "less favored" residential areas. (*Petition for Rehearing*, p. 5.)

What makes the R1 and R2 zones "more desirable?"

Only the exclusion therefrom of buildings involving concentration of people—this fact, and the other residential uses permitted, constitute the only difference. The petitioner would contend that it was entitled to preference in location over schools and other public buildings.

Churches—as organizations—are not only desirable, but essential to the public welfare. The question raised here, however, is not as to the exclusion or inclusion of churches

in the community. The statement (*Petition for Rehearing*, p. 5) that there is here involved "a striking down of the *form* of worship most favored by our culture" is preposterous. Churches are permitted in residential (R3-4) zones and all other zones but R1 and R2. (For indication of uses permitted, see *Statement Opposing Jurisdiction* etc., p. 2; Clerk's Tr., p. 20 Exhibit 1).

How does the zoning requirement, as asserted by appellant (*Petition for Hearing*, p. 15) "tend to defeat the general welfare"? In the confines of the small City of Porterville, the location of any building in one area, as contrasted to another, restricts it only to the degree it is conveniently located as to any given person. A site which favors the convenience of one in the north is conversely that much less convenient to one in the south, and as to those who come from a distance in any direction, the same truth applies.

(See Zoning Map, Clerk's Tr., p. 20.)

The municipality does not bar churches from its limits nor does it threaten to. Their civic, social and moral values are not lost to Porterville by its zoning of church buildings. There are as many church buildings and church congregations with zoning, as without it. All other churches are located consistently with the zoning requirements. Land was available in Porterville for appellant's church building in the permitted areas but appellant deliberately purchased property for a church site with full knowledge that the district in which the site was located was zoned against church and youth center uses. For this reason alone, in addition to others presented in the *Statement Opposing Jurisdiction*, the zoning requirement was not wanting in any "due process" to appellant corporation.

De Lano v. *City of Tulsa*, 26 F. (2d) 640, 645 cert. den. 278 U. S. 654, 73 L. Ed. 564.

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In brief: the petitioner, as land owner, is not emancipated from the common requirements of the State, applicable to all land owners in similar circumstances.

Meyer v. *Nebraska,* 262 U. S. 390.

Pierce v. *Society of Sisters,* 268 U. S. 570.

The Ordinance Is Not Presumptively Invalid

Petitioner argues (*Petition for Rehearing,* p. 11) that the ordinance is presumed invalid, if in operation it collides with or affects the constitutional right of free speech or freedom of religion. Our study leads us to conclude with Mr. Justice Frankfurter:

> "In short, the claim that any legislation is presumptively unconstitutional which touches the field of the First Amendment and the Fourteenth Amendment, insofar as the latter's concept of 'liberty' contains what is specifically protected by the First, has never commended itself to a majority of this Court."
>
> *Kovacs* v. *Cooper,* 336 U. S. 77, 94-5, 93 L. Ed. Adv. Op. 379, 390.

The "clear and present danger rule" does not apply. We are not here concerned with any "censorship or suppression of expression of opinion" or of religious belief or practice. (Cf. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 631-633.) "No official, high or petty" is prescribing "what shall be orthodox in • • • religion" or forcing "citizens to confess by word or act their faith therein" (idem., p. 642).

The freedom asserted by the appellant *does* bring it into collision with rights asserted by other individuals (Cf. idem., p. 630). This matter is *not* one of "self-determination in matters which touch individual opinion and personal attitude" (Cf. idem., p. 631).

In this situation, what interests are minor and which are major in relation to zoning belongs to the Council, the

constituted agency of the State of California, to decide (Cf. idem., p. 649-654).

The councilmen and officials of the City of Porterville are sworn to uphold and defend the Constitution of the United States, no less than the Honorable Justices of this Court. Cal. Government Code, Sec. 1360. They are required to maintain and protect the public health, welfare, safety, well-being, and tranquillity of their community. Certainly, adequate performance of their duty is not promoted by the presumption that whatever they do in this controversial field is unconstitutional. If the ebb and flow of competing public considerations is so apparent to this Court, solely gauged on a cold record, briefs and the argument of counsel, how much more so is it in the city council chamber itself, where all of the individuals concerned urge their manifold interests. The councilmen must live with their determinations and with those individuals affected by them. This Court has divided upon determination of many of such issues. So have councilmen. But should the fact of controversy give rise to a doctrine that whatever accord is reached is presumptively unconstitutional, a presumption that the agents of the state have failed to perform their sworn duty?

> "Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for purposes of oppression and mischief."
>
> *Gaylord* v. *City of Pasadena*, 175 Cal. 433, 437, citing *In re Flaherty*, 105 Cal. 558, 562.

> "The validity of a law is not to be tested, however, by its application to extreme cases involving the assumption of grossly arbitrary violation of their duties by public officers. If every law were declared unconstitutional which by application of such a test could

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be shown capable of working injustice, we should have very few laws left."

Rode v. *Siebe*, 119 Cal. 518, 520-1.

The ruling of the state courts was that the complaint did not state a cause of action. The allegations were, in form, conclusions of law. Facts necessary to show that, under the circumstances, the presumption of constitutionality could not apply were not alleged, as required in

Pacific States Box & Basket Co. v. *White*, 296 U. S. 176.

Wilkins v. *San Bernardino*, 29 Cal. (2d) 332, 344.

Leventhal v. *District of Columbia*, 100 F. (2d) 94, 69 App. D. C. 229.

As heretofore pointed out (*Statement Opposing Jurisdiction*, etc., pt. IV, pp. 5-16), this Court approved judicially, as a comprehensive plan, the validity of a zoning ordinance containing the very distinction between zoning uses of which complaint is made herein in *Euclid* v. *Ambler Realty Co.*, 264 U. S. 292. It likewise held that the action of the council in classifying zones will not be disturbed, if the question whether the *plan* was unreasonable, arbitrary or an unequal exercise of power is fairly debatable.

As contradistinguished to the *comprehensive plan*, this Court established the doctrine that the application of the *plan* to the individual property could be judicially examined to determine, *on the basis of particular facts*, whether it was arbitrary or unequal.

Whitney v. California 274 U. S. 357 (burden is on assailants).

The appellant has not alleged any such facts, and hence no substantial Federal question is presented, since the ordinance is presumptively constitutional and no facts exist to show oppression, arbitrary or unequal application of the

laws, censorship, or any interference with religious belief and practice, *per se.*

Jones v. *Opelika*, 316 U. S. 584, 593, 596.
Reynolds v. *United States*, 98 U. S. 145, 166.
Cantwell v. *Connecticut*, 310 U. S. 296, 303, 304, 308.
Kovacs v. *Cooper*, 336 U. S. 77, 93 L. Ed. 379, 385 (note 10).
Martin v. *Strothers*, 319 U. S. 141, 143-4, 148, 151, 153, 155-156.
Saia v. *New York*, 334 U. S. 558, 562.
Prince v. *Massachusetts*, 321 U. S. 158, 166.
Murdoch v. *Pennsylvania*, 319 U. S. 105, 109.
Whitney v. *California*, 274 U. S. 357, 371, 373.

It is respectfully submitted that the *Petition for Rehearing* should be denied.

December 16, 1949.

CITY OF PORTERVILLE AND
ITS OFFICERS, *Appellees*,
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